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AUTHORITIES CITED

In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 115

THE INTEROCEAN OIL COMPANY, APPELLANT

v.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

No opinion was filed by the Court of Claims.

JURISDICTION

This is an appeal from a judgment of the Court of Claims entered May 26, 1924, sustaining a demurrer filed by the United States, and dismissing the petition upon the ground that it does not state a cause of action. (R. 7.)

The appeal was allowed by the Court of Claims on June 26, 1924 (R. 8), and comes to this Court under Section 242 of the Judicial Code, in force at that time.

THE FACTS

The petition alleges, with much detail, facts and conclusions which may be summarized as follows:

The claimant corporation, on and prior to April, 1918, was engaged in refining, transporting, and dealing in petroleum and petroleum products—chiefly fuel oil—in Carteret, New Jersey, where it owned and operated a refinery and storage tanks valued at $440,000. (R. 1.) Claimant also operated a refinery at Baltimore, Maryland. (R. 1.)

During January, 1918, claimant was represented in Baltimore by Harold F. Brown in the sale of fuel oil to the Shipping Board and to the United States Navy. (R. 1.) Brown made arrangements with Major Ross, Quartermaster Department, United States Army, acting under the direction of Colonel Kimball, in charge, for the purchase by that department of fuel oil for army transports. (R. 1.)

After experimentation made by claimant under the direction of Major Ross, a satisfactory grade of fuel oil was obtained by mixing the heavy gravity oil of claimant with the light gravity oil of the Standard Oil Company. (R. 1.)

Major Ross then directed Brown, the agent of claimant, to be prepared to furnish the full quantity of fuel oil requirements of the Quartermaster Department. (R. 1.)

Repeated demands were made by Major Ross that claimant furnish more storage for fuel oil at Baltimore, but Brown informed him that steel

plates with which to erect tanks could not be obtained on account of the war. Major Ross then ascertained that claimant owned storage facilities at Carteret and demanded that they be removed to Baltimore. (R. 2.)

On April 7, 1918, Major Ross, in a conversation with officers of claimant at New York, informed them that the Quartermaster Department was short of fuel oil at Baltimore, and that it was impossible to increase the facilities there without additional tankage; that unless its tankage at Carteret was removed to Baltimore the Department would seize it and remove it as an exigency of war; but if claimant was willing itself to transfer these tanks on behalf and for the use of the Government, such action would be satisfactory to the Department. Major Ross further assured claimant that all expense incurred and all losses sustained would be paid by the Government. (R. 2.)

Claimant informed Major Ross that the removal of the tanks would mean the destruction of its business at New York, but Major Ross then stated claimant would be compensated for all loss and damage and that failure to remove them would result in the Department itself doing the work. (R. 2.) He desired, however, that the work should be done by the claimant. (R. 3.)

Claimant was convinced that Major Ross was acting within the scope of his authority, because theretofore, whenever he had given verbal orders to Brown, claimant's agent at Baltimore, for the

same general purpose of obtaining purchase of fuel-oil supplies, they had been followed in due time with confirmatory written orders, and thereafter prompt payment had always been made for the oil so purchased. (R. 3.)

In fact the agent Brown, so it is alleged, was so accustomed to this that he had come to comply, without question, to every order, depending, however, upon future confirmation of such orders being made. (R. 3.)

Major Ross, on this occasion, stated in unequivocal language that, in making his demand, he was authorized to act for the War Department, and that written official confirmation thereof would be forthcoming from that Department. (R. 3.)

When, however, these confirmatory orders were not received by claimant, the attention of Major Ross was called thereto, who gave as reason therefor that it was an oversight, and promised they would be forthcoming at once from Colonel Kimball. (R. 4.)

Later, Major Ross stated that he had made out the orders and had delivered them to Colonel Kimball, who, he said, would sign and deliver them to claimant as evidence that proper official authority was being exercised. (R. 4.)

They were never delivered, however, to the claimant, and Colonel Kimball left the service and went abroad because of ill health, and later died. (R. 4.)

The removal of the storage tanks was begun by claimant with all dispatch and was far advanced when the signing of the Armistice, November 11, 1918, made their use unnecessary for the purposes of the War Department, and they were not re-erected and in condition for use at Baltimore until February, 1919. (R. 4.)

The removal of the tanks from Carteret resulted, it is alleged, in claimant losing its right to reerect them at that place because of certain action by the legislature of New Jersey and the local authorities. (R. 4–5.) The items of damage claimed are set forth in the record at page 6 and total $3,575,457.73.

Claimant further avers that if, under the facts, it is not entitled to recover on the verbal contract, then in the alternative it claims that is is entiled to reasonable compensation for the services rendered and for the damage sustained by it in complying with the demands of the War Department in time of war in furnishing necesssary facilities for supplying fuel oil for the efficient conduct of the war. (R. 5.)

On April 25, 1924, a demurrer was filed by the United States to the petition on the ground that it did not state a cause of action. (R. 7.) On May 26, 1924, the court ordered that the demurrer be sustained and the petition be dismissed. (R. 7.)

THE CONTENTIONS

Appellant, in its brief, raises two points:

(1) That the verbal demands made upon claimant by Major Ross constitute a verbal con-

tract, and, there having been a partial performance by claimant thereunder, so it is alleged, Section 3744 R. S., does not apply to this case; and,

(2) That the action taken by Major Ross, even though not confirmed by his superiors, constituted a taking of private property for public use, for which the United States must pay just compensation under the Fifth Amendment to the Constitution.

The United States contends:

(1) There was no taking of appellants' property for public use.

(2) The pleading admits that the verbal orders and promises of Major Ross required the approval and confirmation of his superior officer, and fails to allege facts sufficient to show a contract or a breach thereof.

(3) The removal of the tanks did not amount to such performance of a contract not reduced to writing as makes the United States liable as upon an implied contract.

ARGUMENT

I

There was no taking of appellant's property for public use

Though a considerable portion of appellant's brief is devoted to an argument based upon the contention that it is entitled to just compensation under the Fifth Amendment for property taken, it is significant that the petition contains no allegation to that effect. The claim in the petition is (Par. XIII, R. 5) that it is entitled to recover

under a verbal contract, or, in the alternative, "reasonable compensation for the services rendered and for the damage sustained by it."

The record shows no exercise of dominion by the United States over any of appellant's property. It had a refinery and storage tanks at Carteret in New Jersey, and a refinery and storage tanks at Baltimore. Whatever was done was for the purpose of increasing its tankage at the latter place by transferring tanks from the former place. Though there is nothing to show the exact spot where the tanks were reerected, it does appear that they were reerected at Baltimore (Par. VIII, R. 4); that the solicitude of Major Ross was as to the amount of storage for fuel oil at the "refinery of the claimant at Baltimore" (R. 1), and the reason for the demand for removal was that claimant could not obtain material for the erection of additional tanks at Baltimore (R. 3). The only fair inference is that the claimant removed its tanks from one of its plants and reerected them at its other plant, all for the purpose of increasing its ability to supply the needs of the Government at the latter place. If, by direction of competent Government authority, its tanks had been removed and reerected upon property belonging to the Government, or by the Government turned over to some other company, a different question might be presented. Had the claimant, refusing to comply with the Government's wishes, suffered its property to be commandeered, a different question would of course be

presented; but the appellant has at all times exercised complete ownership and control over its property to the exclusion of the United States, and, so far as the record shows, continued to own the tanks after they were moved to Baltimore, and continues to own them to-day as part of its Baltimore plant. Moreover, the theory of a "taking" is inconsistent with the claim that there was part performance of a contract.

It is alleged in the petition (Par. I, R. 1) that the entire plant of the claimant at Carteret was worth $440,000. The amount of recovery sought in the action is $3,575,457.73 (R. 6), of which the actual expense incurred in taking down the plant at Carteret, freight to Baltimore, and reerection at Baltimore was $53,697.21 (R. 6). Of course most of the elements of damage, as alleged, could not be recovered in a regular condemnation or commandeering proceeding. *Mitchell* v. *United States,* 267 U. S. 341; *Campbell* v. *United States,* 266 U. S. 368; *Bothwell* v. *United States,* 254 U. S. 231; *Sawyer* v. *Commonwealth,* 182 Mass. 245; *Lewis on Eminent Domain* (3rd Ed.), Section 727.

This bill of particulars of damage, however, shows that claimant's property was not taken by the United States. Apparently all that was done was that the claimant removed four of its oil tanks from one plant and reerected them at another. They have at all times been, and now are, the property of the complainant and not of the United States. They have not been destroyed, nor has

claimant been ousted from ownership or possession of them. The Government had undoubted authority to requisition oil tanks under Section 10 of the Lever Act of August 10, 1917, c. 53, 40 Stat. 276, 279. That Act provided for just compensation to be fixed in the first instance by the President; if the amount thereof was unsatisfactory, the owner was to be paid 75 per cent of the amount so fixed with right to sue for such additional sum as would make just compensation. That no requisition was attempted is shown by the absence of these familiar incidents. Furthermore, suit under that Act for just compensation must be brought in a United States District Court. *United States* v. *Pfitsch,* 256 U. S. 547; *Bedding Company* v. *United States,* 266 U. S. 491, 493.

In no sense can appellant's petition be regarded as stating a cause of action for just compensation upon a taking of property.

Appellant refers to Section 120 of the National Defense Act, June 3, 1916, c. 134, 39 Stat. 166, 213, empowering the President, through the head of any Department, to place an order. This Act obviously has no application. There is no allegation that the President, through the head of a Department, placed any order with the appellant, nor is there anything in the Statute which authorizes even the President to require any plant to be constructed or moved from one place to another, and, so far as we know, it has never been held that failure to obey a

verbal order of a subordinate officer of the Army is a felony under that Statute.

II

The pleading admits that the verbal orders and promises of Major Ross required the approval and confirmation of his superior officer, and fails to allege facts sufficient to show a contract or a breach thereof

A contract liability, express or implied, enforceable by the Court of Claims against the United States, can be created only by some officer of the United States lawfully invested with power to make such contracts or to perform acts from which they may be lawfully implied. *Eastern Extension Tel. Company* v. *United States,* 251 U. S. 355.

No Government official who is without authority to bind the United States by express contract can do so by implication. (*Beach* v. *United States,* 226 U. S. 243.) The right to sue the United States in the Court of Claims upon an implied contract means a contract *implied in fact. Sutton* v. *United States,* 256 U. S. 575.

Putting aside for the moment consideration of Section 3744 of the Revised Statutes, it is important to understand just what is and what is not alleged in the petition.

The allegations show conclusively that appellant always understood clearly that every order, request, or demand that Major Ross made required the written confirmation or approval of his superior officer, Colonel Kimball, even when such orders

were given in connection with the routine purchase of fuel oil. When considered together, the averments amount to nothing short of an absolute admission that Major Ross had no authority to bind the United States by verbal orders or at all. The power of approval, or review, or of confirmation necessarily includes the power to disapprove or disaffirm any action taken by a subordinate. The fact that no approval was forthcoming from April 7, 1918, the date of the alleged order (R. 2), to February, 1919, the date of the completion of the work (R. 4), indicates either disapproval by a competent officer in the War Department, or that the matter was never brought to his attention.

There is no allegation that during all this time any one of Major Ross's superiors was ever notified of what was going on, much less that he ratified it. The only allegations are regarding what Major Ross *said* he had done. There is nothing alleged to negative the inference that Major Ross's statements were merely the vain and boastful utterances of a subordinate officer prone to impress others with his importance and fancied authority. There is no allegation that Ross had authority; only that he *stated* that he had authority, and that appellant believed it.

Furthermore, there is no allegation that appellant relied upon the statements of Ross and acted upon the faith thereof. All the allegations are consistent with the theory that appellant's officers be-

lieved it to be good business to enlarge their plant at Baltimore by removing to it the tanks at Carteret, and saw in the talk of Major Ross a chance of having that work paid for by the Government.

Appellant asserts that it had been its practice to comply with the verbal orders of Major Ross for the purchase of fuel oil without awaiting written confirmatory orders, but obviously there was not very much risk in that.

But we have here an entirely different situation. The sale and delivery of routine supplies to the army is quite a different thing from the erection of a plant to manufacture those supplies. Such practice, too, is insufficient to establish that the appellant honestly believed that the verbal promises of the officer were sufficient to bind the Government, in view of the fact that both the officer and the appellant realized that written confirmation was necessary. At best all that can be said is that appellant knew that the authority of Major Ross was limited, that whatever he did or said must be approved by his superior officer, and that the appellant took the chance. In the absence of any direct allegation that appellant relied upon and acted upon the faith of these promises, the inference is strong that the officers of the appellant, shrewd business men, acted upon their own belief that the removal of the tanks to Baltimore would be advantageous to them, with a lingering hope, and perhaps with some confidence, that the Government would pay for the work.

The allegations of the petition are rather vague as to dates, but it does appear that 10 months elapsed between the alleged order and the completion of the work, and the very nature of the work shows that, necessarily, it involved considerable time. If the officers of appellant were actually relying upon the statements of Major Ross, knowing, however, that he was a mere subordinate whose acts were open to approval or disapproval by his superiors, it is inconceivable that, as time went by and approval was not forthcoming, they should not have taken the short trip to Washington or used the mail, telephone, or telegraph in an effort to find out just where they stood with the War Department.

In the absence of direct allegations necessary to show a contract and a breach thereof, the fair inference from the petition is that the purported promise alleged to have been made by Major Ross, that the Government would pay for all the expenses in connection with the removal of the tanks, was relied upon by the appellant merely as an expression of his opinion that the Government would bear the expense. In any event, it did not relieve appellant from its duty to ascertain the scope of Major Ross's authority in the matter. (*Floyd Acceptances,* 7 Wall. 666; *Whiteside* v. *United States,* 93 U. S. 247; *Hume* v. *United States,* 132 U. S. 406.)

The petition is, therefore, lacking in allegations necessary to establish a valid contract, either express or implied, or a breach thereof. Whatever

was said or done by Major Ross was without authority. It is not shown that anything he did or said was known to or ratified by any officer invested with power to bind the United States by word or by deed. It is not shown that the United States received any thing, benefit, or advantage as a result of the activities of Major Ross or of the appellant; nor is it shown that what was done by the appellant was done upon the faith of, or in reliance upon, the words or acts of Major Ross or anyone in authority.

III

The removal of the tanks did not amount to such performance of a contract not reduced to writing as makes the United States liable as upon an implied contract

Appellant argues that if it can not recover for the breach of an express contract, then it is entitled to recover for services rendered upon the theory that, though the contract was not reduced to writing, as required by Section 3744 of the Revised Statutes, it was partially performed. *Clark* v. *United States,* 95 U. S. 539.

This theory, of course, assumes that there was a contract valid and enforceable, except for the fact that it was not reduced to writing. It is settled beyond question that Section 3744, Revised Statutes, is a bar to suit for recovery upon any contract made with the War Department not executed in accordance with the provisions of that section (*Erie Coal & Coke Corporation* v. *United States,* 266 U. S. 518), unless, in some way, the bar has been

removed. It is said, however, that "performance" will remove the bar of that section, and that there has been such performance in this case. Four cases are cited by appellant (Brief, p. 6) as authorities in point.

(a) *Clark* v. *United States, 95 U. S. 539*

This was an appeal from the Court of Claims and arose out of an agreement made between the owner of a ship and an army officer, who agreed that the Government would pay $150 a day for use of the ship, and would pay for her if she should be lost on her trial trip. The vessel was in the hands of the Government for eight days and was lost. Suit was brought for her value and for her use for the eight days. This Court held that the Government was not liable for the loss, because the agreement was not reduced to writing, as required by the Act of June 2, 1862, ch. 93, 12 Stat. 411 (the source of R. S. 3744), but was liable for the use of the vessel for eight days. The Court said (pp. 541–542):

> The facility with which the government may be pillaged by the presentment of claims of the most extraordinary character, if allowed to be sustained by parol evidence, which can always be produced to any required extent, renders it highly desirable that all contracts which are made the basis of demands against the government should be in writing. * * *
>
> We do not mean to say that, where a parol contract has been wholly or partially exe-

> cuted and performed on one side, the party performing will not be entitled to recover the fair value of his property or services. On the contrary, we think that he will be entitled to recover such value as upon an implied contract for a *quantum meruit*. In the present case, the implied contract is such as arises upon a simple bailment for hire; and the obligations of the parties are those which are incidental to such a bailment. The special contract being void, the claimant is thrown back upon the rights which result from the implied contract.

There was no question in the case as to the authority of the officer with whom the contract was made, and the point of the case is that the express contract including indemnity for loss of the vessel was void, but there was a contract implied *in fact* as upon a simple bailment for hire of the ship, because the vessel was used by the Government for eight days. The only allowance was for benefits actually received by the United States under the implied contract.

The recovery for the use of the vessel was at the rate of $150 a day, the agreed price, but this was allowed, not because it had been agreed upon, but because, as the Court said (p. 543):

> This value, in the absence of any other evidence on the subject, may be fairly assumed at what was stipulated for in the parol contract. Though not binding or conclusive, it may be regarded as admissible evidence for that purpose.

Citing *Browne, Statute of Frauds*, sections 117–130.

(b) *Harvey* v. *United States, 105 U. S. 671*

This case also was an appeal from the Court of Claims. It was heard by that court under a special Act of Congress which empowered the Court of Claims to reform the contract in question according to principles of equity, and to render judgment upon it as reformed. It has no bearing upon the present case, and involved no question of the power of a contracting officer or of payment by the United States for anything except benefits actually received and accepted.

(c) *United States* v. *Andrews, 207 U. S. 229*

This case also was an appeal from the Court of Claims. The suit was for the contract price of paper purchased by the War Department for use in the public printing office in the Philippine Islands. There was a letter from the Department to the claimant asking if it would furnish the paper, and a reply offering to furnish, and a letter accepting the proposal. The paper was to be shipped according to instructions. Instructions were followed and the paper shipped, but it was damaged in transit. This Court held that delivery by the consignor to a common carrier, according to instructions, and *acceptance by the consignee* or his agent of bills of lading issued by the common carrier for the goods, constituted delivery. There

was no question of the authority of the army officers to make the contract, and the paper having been, in contemplation of law, delivered to and accepted by the United States, claimant was entitled to payment.

(d) *United States* v. *N. Y. & Porto Rico S. S. Co., 239 U. S. 88*

This case held merely that failure to comply with Section 3744 of the Revised Statutes did not bar the United States from maintaining an action for breach of contract. The section did not make the contract *void,* but only unenforceable *against* the United States.

In *St. Louis Hay & Grain Company* v. *United States,* 191 U. S. 159, an appeal from the Court of Claims, the Grain Company tried to take advantage of the illegality of a parol contract for the sale of hay to the United States, so as to recover, upon *quantum valebat,* more than the contract price of the hay, after it had been delivered and paid for, that is, after the contract had been fully performed upon both sides. In deciding against this contention, the Court said (page 163):

> When a lawful transfer of property is executed it does not matter whether the terms of the execution were void or valid while executory; the transfer can not be revoked or the terms changed. A promise to make a gift does not bind, but a gift can not be taken back, and a transfer in pursuance of

> mutual promises is not made less effectual by those promises or by the fact money was received in exchange. The contract may be void, as such, but it expresses the terms on which the parties respectively paid their money and delivered their goods.

There is nothing in these cases which gives color to the claim that an order given or a promise made by any officer of the army imposes liability upon the United States merely because the person to whom the order was given obeyed it. The principle to be deduced from the cases is that of a contract implied in fact. To bind the United States and to take the case out of Section 3744 of the Revised Statutes there must be such performance and such conduct on the part of both parties as gives rise to a contract implied in fact (compare *Baltimore & Ohio R. R. Co.* v. *United States,* 261 U. S. 592), such as delivery to and acceptance by the United States of property, as in the *Andrews case;* or the use by the United States of a ship under circumstances amounting to a common-law contract of bailment, as in the *Clark case.* And the acts of the Government officials must be those of officials lawfully invested with power to perform those acts (*Eastern Extension Tel. Company* v. *United States,* 251 U. S. 355) for the limitation upon the authority to impose contract obligations upon the United States is as applicable to contracts by implication as it is to those expressly made (*Sutton* v. *United States,* 256 U. S. 575).

Section 3744, Revised Statutes, is to be regarded as a Statute of Frauds (*Clark* v. *United States,* 95 U. S. 539). The decisions of this Court which have permitted recovery against the United States after performance, notwithstanding Section 3744, show an intention to follow in general the rules which have usually been applied to cases arising under the original Statute of Frauds (29 Car. II, c. 3) as reenacted in various forms in this country. In the original statute (Sec. 17), relating to the sale of goods, wares, and merchandise, as in most of the statutes of the States, acceptance of the goods made the written memorandum unnecessary. The analogy of the *Andrews* and *Clark cases, supra,* is obvious. Where the contract has been in fact completely executed on both sides, the rights, duties, and obligations of the parties resulting from such performance, stand unaffected by the statute. (*Browne, Statute of Frauds,* 5th Edition, § 116, and cases there cited.) Such was the *St. Louis Hay & Grain Co. case, supra.*

But where the statute is mandatory, and there has been performance on one side only, and the person to be charged pleads the statute, the liability is only for property or benefit received and held by him. The rule is well stated in *Boone* v. *Coe,* 153 Ky. 233, a leading case.

In that case, at page 238, the court quotes with approval the following rule from 29 Am. & Eng. Encyc. of Law, 836:

"Although part performance by one of the parties to a contract within the statute of frauds will not, at law entitle such party to recover upon the contract itself, he may nevertheless recover for money paid by him, or property delivered, or services rendered in accordance with and upon the faith of the contract. The law will raise an implied promise on the part of the other party to pay for what has been done in the way of part performance. But this right of recovery is not absolute. *The plaintiff is entitled to compensation only under such circumstances as would warrant a recovery in case there was no express contract, and hence it must appear that the defendant has actually received or will receive some benefit from the acts of part performance.* It is immaterial that the plaintiff may have suffered a loss because he is unable to enforce his contract." (Italics ours.)

And also the following from *Browne on Statute of Frauds,* Section 118–a:

The rule that, where one person pays money or performs services for another upon a contract void under the statute of frauds, he may recover the money upon account for money paid, or recover for the services upon a *quantum meruit,* applies only to cases where the defendant has received and holds the money paid or the benefit of the services rendered. It does not apply to cases of money paid by the plaintiff to a third person in execution of a verbal contract between the

plaintiff and defendant, such as by the statute of frauds must be in writing.

(Citing cases in support of the rule.)

Compare *Dunphy* v. *Ryan*, 116 U. S. 491.

What this Court has said of the effect of performance of contracts not executed in accordance with Section 3744, when considered in the light of the facts involved, is consistent with this rule under the Statute of Frauds. No recovery has been permitted except for property actually used by the United States or for goods delivered and accepted.

Where a contract is made by officers of the United States not authorized to make it, the mere receipt by the United States of benefits is not enough to impose liability. (*Camp* v. *The United States*, 113 U. S. 648.)

Acceptance of the appellant's contention would mean that anybody could recover against the United States merely because he has done something which an army officer told him to do, whether the officer was authorized to give the order or not, and whether or not any property was delivered to and accepted by the United States or any value received and retained by it. This would be wholly subversive of the principles stated so emphatically in *Eastern Extension Tel. Company* v. *United States*, 151 U. S. 355, and *Sutton* v. *United States*, 256 U. S. 575.

No cause of action under the Dent Act, March 2, 1919, c. 94, 40 Stat. 1272, is stated, for it is not

alleged that appellant presented its claim to the Secretary of War within the time limited by the Act.

CONCLUSION

Appellant can not recover for property taken, for none was taken:

Nor upon express contract, for it was not in writing as required by § 3744, Revised Statutes, even if an express contract has been sufficiently pleaded:

Nor upon an implied contract resulting from performance, for there has been no such performance as raises the implication:

And these are the only possible grounds of recovery.

The judgment of the Court of Claims should be affirmed.

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DECEMBER, 1925.

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